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IN THE

Supreme Court of the United States

October Term, 1962

No. 1027

OTIS ELEVATOR COMPANY,

Petitioner,

v.

LOCAL 453, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Question Presented

May a federal court, on the ground that it is offensive to public policy, refuse to enforce the award of an arbitrator which imposes a seven-month suspension but reinstates an employee discharged for gambling upon the premises of the employer and which award was premised upon and submitted to the arbitrator in the following manner:

> "Has Joseph Calise been discharged for just cause and, if not what shall the remedy be?"

Statement

As a result of the observations of a detective investigator from the office of the District Attorney of Westchester County who posed as an employee of the Petitioner Company for five weeks, one Joseph Calise, a member of Respondent Union, employed by the Company, was convicted on December 1, 1960 in the County Court of Westchester County of knowingly possessing policy slips in violation of New York Penal Law, Sec. 974, a misdemeanor, and fined $250.

For almost a year after the arrest of Calise and the institution of criminal proceedings against him, the Company undertook no disciplinary action against him. However, on December 5, 1960, Calise, an assembler with 24 years seniority, was discharged.

The Union duly grieved and the question was arbitrated before Millard L. Midonick, Esq., presently a judge of the Family Court of the State of New York and formerly a Municipal Court Judge of the City of New York. At the hearing, counsel for the parties stipulated to the following submission: "Has Joseph Calise been discharged for just cause, and if not what shall the remedy be?" (R. 5a). In granting the grievance, the Arbitrator acknowledged the many years of satisfactory service of the grievant, his unbroken seniority, his dependent wife and four children between the ages of 1 and 8, his age 47, and that his rights under the Company Pension Plan would not vest until he attained age 50 while in the Company employ (R. 6a). The Arbitrator also recognized the difficulty and perhaps inability of the grievant to obtain suitable employment if the discharge were permitted to stand. The Company's contentions that gambling on its premises during working hours was just cause for discharge and that failing to uphold the discharge would render nugatory future Company disciplinary action were rejected by Judge Midonick.

In addition to the submission agreement, the Arbitrator took into consideration and set forth in full in his opinion the following provisions of the collective agreement between the parties:

> "Section 2. The decision of such arbitrator shall be final and binding upon the parties but the arbitrator shall not have the power to add to, subtract from, or modify the terms of this Agreement, or any Agreement supplemental thereto . . . ." Article VI.
>
> "Section N. The Employer shall have the right to discharge any employee for just cause. The Union shall have the right to challenge the propriety of the discharge of any employee, except a probationary employee, and any such discharge shall be considered a grievance to be dealt with in accordance with the grievance procedure heretofore set forth in Article V. Employees discharged without just cause shall receive pay for all lost time unless an arbitrator rules otherwise." Article IX (R. 4a-5a).

In consideration of all the above factors, the Arbitrator did not uphold the discharge nor did he order reinstatement from the date thereof. Instead the Arbitrator deemed the period from December 5, 1960 through July 2, 1961 to have been a disciplinary lay-off with loss of seniority and other benefits flowing from the Collective Agreement. In requiring reinstatement as of July 3, 1961, which post-dated Judge Midonick's award, the Arbitrator also took into consideration the fact that four other employees were involved in the same illegal activity for which Calise was convicted, although none of them was subjected to criminal prosecution or discharge. He likewise considered the possibility of harm to the operations of the Company resulting from Calise's reinstatement and found proof thereof absent. (R. 9a; 10a-11a.)

When Petitioner thereafter made clear its intention not to comply with the award of the Arbitrator, the Union

sought, by preliminary injunction, to compel compliance. Such relief was denied by MacMahon, D. J. in 201 F. Supp. 213 and the Union then moved for summary judgment upon the same grounds. That motion was denied by Cashin, D. J., whose opinion is reported at 206 F. Supp. 853, reciting in pertinent part that:

> "In the instant case, Calise was not just gambling himself, but he was carrying on organized professional gambling and had four other employees working for him. Under these circumstances I cannot compel the defendant to comply with the arbitration award." (R. 14a)

The District Court then quotes verbatim from the opinion of Judge MacMahon the following:

> "* * * A collective bargaining agreement may well give an arbitrator power to dispense his own brand of industrial justice, but the contract, and his power under it, are limited by, and must yield to, overriding public policy. This award clashes with that policy. It indulges crime, cripples an employer's power to support the law, and impairs his right to prevent exposure to criminal liability. The award is, therefore, void and unenforceable. Black v. Cutter Laboratories, 351 U. S. 292 (1956); Hurd v. Hodge, 334 U. S. 24, 34-35 (1948); Matter of Western Union Tel. Co., 299 N. Y. 177 (1949); Avco Corp. v. Presteska [174 A. 2d 684 (Conn. 1961)]." (Ibid.).

An appeal was then prosecuted to the Court of Appeals for the Second Circuit from the judgment entered by Judge Cashin. The appellate court ruled unanimously in material part as follows:

> "* * * Judge Cashin nevertheless concluded, for the same reasons for which Judge MacMahon had concluded, that the award of the arbitrator was judicially unenforceable because of its repugnance to public policy. The precise nature of the public policy which the award was thought to offend is not made clear by either opinion in the District Court."

(R. 21a; Appendix B to Petitioners Certiorari Brief, p. 26; 314 F. 2d 25).

* * *

"The award of the arbitrator was regular in every respect. There is no substantive principle of federal labor law which authorizes denial of enforcement on the present facts for reasons of public policy. Accordingly, the judgment below is reversed, with instructions that an order issue compelling Otis to comply with the terms of the arbitration award." (Id. at 23a; id. at p. 28).

Reasons for Denying the Writ

1. The decision of the Fourth Circuit in *Textile Workers Union* v. *American Thread Co.*, 291 F. 2d 884, cited by Petitioner as evidence of a conflict between circuits, is inapposite. The court below cited *Textile Workers* appropriately for the proposition that "an arbitrator's authority is not unlimited", holding however, that in the case at hand "the terms of the contract and of the submission * * * clearly bespeak arbitrability." (R. 20a; Appendix B of Petitioner, p. 25). Indeed Judge MacMahon's opinion in the District Court as to the limitation of the Arbitrator's authority disposed of Petitioner's reliance upon *Textile Workers* as follows:

> "The court must take the agreement and the stipulated submission as the parties made them. Both squarely put the question of what constitutes 'just cause' for discharge up to the arbitrator. We think it plain, therefore, that the collective bargaining agreement, read with the question submitted, does empower the arbitrator to settle the dispute involved." (Appendix A of Petitioner, p. 15).

Textile Workers dealt with a specific limitation imposed upon the arbitrator by the agreement, and did not, as here, involve in addition to the contractual grant of powers, a specific mandate to determine whether or not the grievant

had been discharged for cause and, if not, then leave to the arbitrator the task of fashioning an appropriate remedy.

Even assuming, which we do not, that the Fourth Circuit's decision in *Textile Workers* is out of step with the mainstream of national labor policy as enunciated by this Court, the mere assertion of a party, disgruntled by a particular arbitral award, that the arbitrator exceeded his authority, does not create a conflict between circuits.

There is nothing even approaching a conflict between circuits and there exists, on that basis, no reason for granting the writ.

2. Though the issue which Petitioner seeks to present to this Court arises within the framework of the enforcement, pursuant to Section 301 of the Labor Management Relations Act, of an arbitral award, wherein the parties voluntarily contracted for the adjudication of disputes by a third party, it nonetheless relies greatly upon cases which arise in some other context. For example, in both *Southern S. S. Co.* v. *NLRB*, 316 U. S. 31 and *NLRB* v. *Fansteel Corp.*, 306 U. S. 240, cited by Petitioner, this Court refused to enforce Board orders which were contrary to supervening statutory or *decisional* criteria. In those cases, this Court was faced with the task of reconciling the statutorily-based responsibility of the Board with other well-defined statutory or decisional guidelines. Similarly, the racially restrictive covenants sought to be upheld in *Hurd* v. *Hodge*, 334 U. S. 24 and *Shelley* v. *Kraemer*, 334 U. S. 1, were denied enforcement here in the first (a federal case) because of the well-pronounced contrary public policy of the United States as exemplified by R. S. 1978, and in the other (a state case) because it ran afoul of the equal protection guaranty of the Fourteenth Amendment.

An arbitration award directing the parties to bargain in *Glendale Mfg. Co.* v. *Garment Workers*, 283 F. 2d 936, cert. denied 366 U. S. 950, was properly denied enforcement

because it directly clashed with an NLRB order whereby a union was decertified. The rationale is elementary: the Board has primarily responsibility on the question of unit determinations and its findings may not be lightly regarded by either courts or private parties.

Western Union Telegraph Co. v. *American Communications Assn., CIO*, 299 N. Y. 177, the leading New York case on the refusal of the judiciary to enforce arbitral awards which are contrary to public policy, is distinguishable, *inter alia*, on the grounds that the Federal Communications Act and the Penal Law of the State of New York forbade the very conduct which was sought by the union therein to be vindicated by means of the arbitration process. No such result is sought or has been achieved here. The conduct of Calise has been roundly condemned on all sides—by union counsel, by the arbitrator, by the Westchester County Court, by the Federal Courts. Indeed, for his misdeeds he has been punished in at least two temporal forums. The enforcement of Judge Midonick's award is therefore not contrary to any known public policy. In this respect, there is no need to elaborate upon the opinion of Judge Marshall below.

However much we may disagree with the substantive merit of this Court's dismissal of the appeal in *Black* v. *Cutler Laboratories*, 351 U. S. 292 (1956), the State of California had apparently established to the satisfaction of this Court that its own State legislative enactments made the continued private employment of an alleged communist a subject not susceptible of enforcement in an arbitral proceeding, for this Court explicitly held that "the decision involves only California's construction of a local contract under local law, and therefore no substantial Federal question is presented." *Id.* at 299.

Along the same lines, but we concede, not distinguishable from the case at bar, is *Avco Corp.* v. *Prostoka*, 174

A. 2d 684 (Conn. Super. Ct. 1961), which is almost at one with the instant case. The distinguished arbitrator, whose award was refused enforcement by the Connecticut court, was Paul R. Hays, Esq., presently a Judge of the Second Circuit Court of Appeals. The decision of the Superior Court was manifestly erroneous, and regrettably the Court of Errors and Appeals did not pass on the question. This decision of the Connecticut Superior Court, then, is the sole *authority* upon which Petitioner can rely here.

3. The public policy considerations have been well considered by the Court below and have been found wanting. Whether we apply federal law (*Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448) or state law not incompatible therewith (*Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95; *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502), Petitioner has not shown, nor cannot show, but for the *Presteska* case, a principle or a decision upon which it can rely for the proposition that the reemployment of a convicted gambling misdemeanant is contrary to or forbidden by public policy.

CONCLUSION

For all these reasons, the petition for a writ of certiorari should not be granted.

Dated, May , 1963.

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